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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1256

CONNELL CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

PLUMBERS AND STEAMFITTERS LOCAL UNION NO. 100 OF UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR AIR-CONDITIONING AND REFRIGERATION INSTITUTE, AMERICAN BOILER MANUFACTURERS ASSOCIATION, AIR MOVING AND CONDITIONING ASSOCIATION, INC., ARCHITECTURAL WOODWORK INSTITUTE, AMERICAN CONSULTING ENGINEERS COUNCIL, NATIONAL ELECTRICAL MANUFACTURERS ASSOCIATION, NATIONAL SOCIETY OF PROFESSIONAL ENGINEERS, AND NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, AS AMICI CURIAE

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INTRODUCTION

This brief on behalf of Air-Conditioning and Refrigeration Institute, American Boiler Manufacturers Association, Air Moving and Conditioning Association, Inc., Architectural Woodwork Institute, American Consulting Engineers Council, National Electrical Manufacturers Association, National Society of Professional Engineers, and National Woodwork Manufacturers Association, as *amici curiae*, is filed pursuant to written consent of the parties under Rule 42(2) of this Court. The *amici* herein support the position of the petitioner, Connell Construction Company, Inc.

INTEREST OF THE AMICI CURIAE

The associations participating in this joint brief represent a broad cross-section of the manufacturers, designers and specifiers of products and materials used in construction throughout the United States. They have participated individually and jointly in numerous cases before the National Labor Relations Board, the lower federal courts and this Court testing the legality of various restrictive agreements and pressures between unions and contractors in the construction industry. They have consistently advocated effective implementation of the federal labor and antitrust laws to prevent unwarranted restrictions upon the use of competitive, efficient methods and materials in construction. While the *amici* thus have a substantial common interest in the issues presented in this case, they have varying economic stakes in the outcome of these proceedings. The interest of each of the *amici* is set forth below.

A. The Air-Conditioning and Refrigeration Institute (ARI)

ARI is a national trade association consisting of approximately 175 manufacturing companies in the air-

conditioning and refrigeration industry. These companies are the principal manufacturers of the end-products and components in this industry, which has a total volume annually in excess of $3.4 billion. End-products include unitary air-conditioners, room fan coil and air induction air-conditioners, centrifugal, absorption, and reciprocating liquid chilling packages, and central station air handling units. Components include compressors, motors, condensers, condensing units, coils, controls, valves, tubing, wiring, and refrigerant gases. Plants of ARI members are located throughout the United States and the air-conditioning and refrigeration equipment they manufacture is sold and shipped to every state and to foreign countries.

B. American Boiler Manufacturers Association (ABMA)

ABMA is a trade association representing approximately 80 manufacturers and distributors of steam boilers and related equipment. These companies, which are located throughout the United States, are the principal manufacturers of packaged boilers and components. Their annual production of such boilers exceeds $100,000,000.

C. Air Moving and Conditioning Association, Inc. (AMCA)

AMCA is an international trade association comprised of companies manufacturing fans and other air moving devices used in industrial and commercial ventilating and air-conditioning systems. An affiliated division includes manufacturers of louvers, dampers and shutters. The total membership includes 67 U.S. manufacturers. Products which they produce are valued at approximately $200,000,000 annually.

D. Architectural Woodwork Institute (AWI)

AWI is a national trade association of 380 manufacturers and distributors of architectural woodwork.

Products of its members consist of a wide variety of precut, prefit or preassembled items or materials, such as beams, special windows, doors, wall paneling, cabinet work and all forms of custom mill work for architectural and aesthetic purposes, used in homes, public buildings, schools and churches. The total volume of such products produced by AWI members approximates $150,000,000 annually.

E. American Consulting Engineers Council (ACEC)

ACEC is a federation of state and regional associations comprising some 2,500 independent engineering firms. These firms range from highly specialized sole proprietors to large, multi-office general practitioners. The firms represent more than 7,000 legally registered (in accordance with state laws) principals and partners, plus more than 40,000 engineering technicians and other employees. Consulting engineering is a $3 billion per year U.S. industry. Firms design airports, bridges, dams, harbors, parks, power plants, stadia, waste treatment plants and similar facilities worth $35 billion.

F. National Electrical Manufacturers Association (NEMA)

NEMA is a national trade association consisting of approximately 540 members who manufacture, *inter alia*, electrical control panels, enclosed switches, panel boards, industrial controls, conduit fittings, outlet and switch boxes and wiring devices installed in all types of structures during their erection on construction sites. Total sales of the electrical manufacturing industry in 1973 amounted to over $58 billion.

G. National Society of Professional Engineers (NSPE)

NSPE is composed of 67,000 members through 53 affiliated state organizations (including the District of Columbia, Puerto Rico and Guam) and approximately

500 local chapters. The members are involved in all fields of engineering practice and all branches of engineering. Approximately 13,000 of the Society members are engaged in the private practice of engineering. Also, many members of the Society are engaged in engineering activity for industry and for federal, state and local governments.

H. National Woodwork Manufacturers Association (NWMA)

NWMA actively represents the interests of wood door, window and millwork manufacturers. Its membership currently includes approximately 90 manufacturers and 20 associates who are suppliers to the industry. Their production represents the majority of wood windows and doors made in the United States and amounts to approximately $300,000,000 annually.

ARGUMENT

I. Introduction

In view of the many able briefs filed by the parties and other *amici curiae* herein tracing the development of antitrust principles as applied to labor-business combinations and analyzing their relationship with federal labor legislation, it would serve little purpose to undertake yet another full-scale treatment of those matters in this *amicus* brief. Accordingly, we shall merely summarize briefly, under Point II below, certain controlling principles of antitrust and labor law which we believe were disregarded or misapplied by the majority of the court of appeals. We shall then concentrate our attention, in Point III, upon certain practical considerations regarding the construction industry which we believe must be taken into account in resolving the issues presented herein.

II. The Union's Subcontracting Agreement With Connell, and Its Procurement and Maintenance Thereof, Violated Controlling Principles of Federal Labor and Antitrust Law.

This Court's prior decisions clearly establish the dual prerequisites for a labor organization's enjoyment of immunity from the antitrust laws. First, the organization must act on its own and not conspire or combine with any non-labor interest to restrain competition or injure the business of another. *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); *Allen-Bradley* v. *IBEW, Local 3*, 325 U.S. 797 (1945). Secondly, even in the absence of such a conspiracy or combination, a union must confine its anticompetitive activities to lawful conduct undertaken pursuant to a "legitimate union interest." *Local 189, Amalgamated Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965).

Although the majority of the Fifth Circuit panel below acknowledged the existence of this "two-fold test" (Pet. App. B-21), its conclusion that the dual conditions for immunity were satisfied here stems from a faulty interpretation of both requirements.

First, in holding that the Union's agreement with Connell did not constitute a combination or conspiracy in restraint of trade, the court was apparently of the view that a union's combination with a single non-labor entity is not sufficient to defeat the union's antitrust immunity. Thus, the court indicated that there would have to be an existent conspiracy to monopolize between at least two non-labor entities, with which the union joined, in order for the union to lose its exempt status (Pet. App. B-22-23). In this view, a union could not create an illegal conspiracy, but could attach itself to one already in existence.

In so holding, the majority below went a step beyond this Court's prior holdings and, we submit, in the wrong direction. It transmuted into a rule of law Mr. Justice Black's *arguendo* assumption in the *Allen-Bradley* case, *supra*, that an employer-union agreement to boycott non-union goods "standing alone would not have violated the Sherman Act." (325 U.S. at 809). But an agreement between two parties which forecloses dealing with a third is none the less a "combination in restraint of trade" within the meaning of the Sherman Act simply because one of the parties is a union.

Mr. Justice Black's assumption that such an agreement would be exempt was clearly dictum on the facts of *Allen-Bradley* and was premised on the then-current broad view of labor's antitrust immunity as derived from the Norris-LaGuardia Act. See *United States* v. *Hutcheson*, 312 U.S. 219 (1941). After *Allen-Bradley*, and partially in response to the above-quoted dictum therein, Congress specifically undertook in the Taft-Hartley amendments of 1947 and the Landrum-Griffin amendments of 1959 to narrow the scope of union activity protected by Norris-LaGuardia by prohibiting secondary boycotts and "hot cargo" agreements of the sort referred to by Mr. Justice Black. This subsequent legislation, we submit, necessarily had the concomitant effect of narrowing labor's antitrust immunity. Accordingly, any validity there may once have been to the notion that a union's combination with a single employer could not constitute an illegal conspiracy for antitrust purposes has now clearly been extinguished.[1]

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[1] In any event, it is unrealistic to view the Union-Connell combination in isolation. The record shows that the Union is party to an area wide master agreement binding all signatory subcontractors to observe identical wage rates, and incorporating a pledge by the Union not to grant any other contractor more favorable terms. Thus, an illegal conspiracy does exist, and the agreement with Connell merely expands it.

A related point which is implicit in the court's reasoning below but, in our view, inconsistent with governing antitrust principles, is the notion that both parties to an illegal conspiracy must be willing participants therein. Nothing in the antitrust laws suggests the need for an inquiry into the motives of each party to a combination in restraint of trade. A coerced conspirator is just as much a conspirator as a willing one. Thus, if a union persuades, induces or even coerces a businessman to combine with it in a manner calculated to restrict competition and injure the business of others, the union's immunity is lost, just as it would be if the businessman had been the moving party in the scheme. Any contrary rule would give a legitimizing effect to raw economic power, which would be totally inconsistent with the philosophy and purpose of the antitrust laws.

Accordingly, we believe that there was clearly a "combination" or "conspiracy" in restraint of trade in the present case, and that dismissal of the complaint was therefore unwarranted.

The second major precondition to a union's antitrust immunity—that its action be calculated to promote a legitimate union interest—was also misapplied by the majority below. We believe, with dissenting Judge Clark, that union conduct which violates the National Labor Relations Act thereby automatically loses its claim to absolute antitrust immunity. As Judge Clark stated:

> There is no justifiable reason to reflexively afford an antitrust exemption to conduct which Congress has expressly forbidden to labor organizations. The secondary boycott prohibitions of the Labor-Management Relations Act, as amended by Labor-Management Reporting and Disclosure Act, were intended to prevent such a use of economic power directed towards neutral parties. When a union seeks to organize those who work for an employer or group

> of employers there can be no doubt that Congress has granted it freedom from antitrust prosecution to act in concert against such employers in order to bring such employees as may be affected into a unified group of sufficient size to allow the union to deal on a par with management. Congress' balance of the competing interests, as I divine legislative intent, is calculated to produce union peer status, but not union dominance. Therefore, I would hold that where a union bypasses the congressionally sanctioned methods of organizing the employer whose employees it seeks to unite (here, the individual subcontractors) and illegally brings pressure on a neutral, secondary source of work for all such employers within an area (Connell) to force that unrelated economic entity to execute a contract which requires that all directly involved subcontractors bring their work forces into the membership of this local or starve for lack of work, then that union has passed beyond the scope of antitrust immunity. (Pet. App. B-56-57, footnotes omitted).

Judge Clark noted that the rule thus stated "may bear a superficial resemblance" to the Court's holding in *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443 (1921), which this Court subsequently held in *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469 (1940), had been effectively overruled by the Norris-LaGuardia Act. However, as Judge Clark pointed out, subsequent Congressional action has changed the state of the relevant law since the time of *Apex*, and secondary boycotts are now specifically recognized as illegitimate except where they are expressly permitted. This Court reached essentially the same conclusion in *National Woodwork Mfrs. Ass'n* v. *N.L.R.B.*, 386 U.S. 612, 632 (1967), when it stated that:

> In effect Congress, in enacting Section 8(b)(4)(A) of the Act, returned to the regime of *Duplex Printing Press Co.* and *Bedford Cut Stone Co.*

Thus, as under *Duplex*, the scope of legitimate union activity was seen as limited to "trade union activities directed against an employer by his own employees." *Id.* at 621. Secondary activity directed against a neutral employer and "carried on for its effect elsewhere" was recognized as exepecting legitimate union interests. *Id.* at 632.

It therefore becomes necessary, in resolving the antitrust issues presented herein, for the Court to consider whether the Union's contract with Connell and its procurement thereof were illegal under the amendments to the National Labor Relations Act. Like Judge Clark, we believe it was clear error for the court below to defer ruling on this issue on the ground that it rested within the "primary jurisdiction" of the National Labor Relations Board. (Pet. App. B-59-61). This Court rejected a similar contention in *Jewel Tea, supra*, declaring that "the doctrine of primary jurisdiction is not a doctrine of futility." 381 U.S. at 686. To hold in the present case that the courts must withhold consideration of the antitrust issues raised by the complaint until the Board determines the labor law issues would result in an even greater futility than the "expensive and merely delaying administrative proceeding" decried by the Court in *Jewel Tea*. In this case it would foreclose the plaintiffs from obtaining any remedy, since the NLRB General Counsel has effectively barred their access to that agency's adjudicatory processes.[2] Congress cannot have intended, when it divided the initial adjudicative authority under the labor and antitrust acts between administrative and judicial tribunals, that parties subjected to conduct violative of both statutes should have resort to neither forum.

[2] See Pet. 6, n. 3, where it is pointed out that, despite the urging of the Fifth Circuit majority, the General Counsel of the NLRB continues to refuse to issue unfair labor practice complaints in cases presenting the statutory issue involved herein.

Thus, finally reaching the statutory issue which the Fifth Circuit majority refused to consider, we submit that the Union's agreement with Connell and its pressures to obtain it clearly violated Sections 8(b)(4)(A) and 8(e) of the National Labor Relations Act. First, as Judge Clark reasoned, the defense that the agreement was protected by the construction industry proviso to Section 8(e) is unavailable to the Union on the facts of this case, since Connell, in entering that agreement, did not act in the capacity of "an employer in the construction industry" within the meaning of the proviso. (Pet. App. B-62). Indeed, the fact that Connell may literally have been "an employer" has no relevance for these purposes, since the Union never dealt with Connell in any capacity relating to Connell's own employees. On these facts, it would have made no difference if Connell was merely an individual operator who had no employees at all of his own on the job. Yet in that case he clearly would not be "an employer in the construction industry," even under the literal language of the proviso.

We believe that Congress, in exempting jobsite hot cargo agreements "between a labor organization and an employer in the construction industry" from the general ban of Section 8(e), clearly had in mind only agreements negotiated between a union and *an employer acting in his capacity as an employer of workers represented by that union.* It would make no sense to prohibit unions from entering such agreements with general contractors having no employees of their own, but allow them where the general contractor happened to have some employees of another trade whom the union had no interest in representing. To so hold would make the proviso's applicability hinge on an accident of circumstance wholly unrelated to its purposes.

Nor did Congress intend in Section 8(e) to blur the distinction between general contractors and subcontractors

so as to treat the general contractor on a construction project, in effect, as "an employer" of the subcontractor's employees. Indeed, although commentators had urged such a rationale under the Taft-Hartley amendments,[3] this Court specifically held in *N.L.R.B.* v. *Denver Bldg. Trades Council*, 341 U.S. 675 (1951), that the separate status of independent contractors on construction projects must be given full effect under Section 8(b)(4) of the Act. When Congress enacted Section 8(e) and the construction industry proviso thereto in 1959, it made clear that it intended *Denver* to "remain in full force and effect." Conf. Rep., H. Rep. No. 1147, 86 Cong., 1st Sess., p. 39 (1959), I 1959 Leg. Hist. 1433. Moreover, several attempts to reverse *Denver* by legislation have failed. See *N.L.R.B.* v. *Muskegon Bricklayers Union No. 5*, 378 F.2d 859, 862-863 (6th Cir., 1967). See also, H. Rep. No. 741, 86 Cong., 1st Sess., pp. 22-23, I 1959 Leg. Hist. 780-781. Accordingly, we submit that Connell was not serving in the capacity of "an employer in the construction industry" within the meaning of the proviso in any of its dealings with the Union, and that the jobsite exception to Section 8(e)'s general ban on secondary boycott agreements is therefore inapplicable.

Furthermore, even if the construction industry proviso had been otherwise applicable, we submit that it would not have legitimized the Union-Connell agreement, because that agreement was obtained only as a result of coercive economic pressure by the Union. In this regard, we refer the Court to the Labor Board's well-reasoned decision in *Construction, Production & Maintenance Laborers Union, Local 383 (Colson and Stevens Constr. Co.)*, 137 NLRB 1650 (1962), holding that only vol-

[3] See, e.g., Comment, The Impact of the Taft-Hartley Act on the Building and Construction Industry, 60 Yale L. J. 673, 689 (1951), where the writer urged that for purposes of the secondary boycott provisions of the Act "all the men working on the [construction] job should be considered the general contractor's employees . . . ."

untary agreements are within the construction industry proviso to Section 8(e). Although the Board later repudiated that holding in response to its rejection by several courts of appeals,[4] it was, we submit, a proper construction of Sections 8(b)(4)(A) and 8(e), and should now be adopted by this Court. Congress made it clear that in adding the jobsite proviso to Section 8(e), it did not intend to "change existing law with respect to . . . the legality of a strike to obtain [a jobsite secondary boycott] contract."[5] The "existing law" thus referred to undisputedly held that a union could not strike to obtain such a clause, in the construction industry or elsewhere, without violating the secondary boycott provisions of the Act.[6] This was so even though, at the time, voluntary hot cargo agreements were held to be permissible under the Act. *Local 1976, Carpenters (Sand Door & Plywood Co.)*, 357 U.S. 93 (1958).[7]

III. The Practical Effect of Agreements to Boycott Non-Union Subcontractors Is to Restrain Competition Based Upon Technology and Efficiency of Operation, As Well As Competition Based Upon Labor Rates.

Although the court below acknowledged the principle of the *Jewel Tea* case, *supra*, that labor's antitrust im-

[4] See *Northeastern Indiana Bldg. & Constr. Trades Council (Centlivre Village Apartments)*, 148 NLRB 854, *enf. denied*, 352 F.2d 606 (D.C. Cir., 1965).

[5] H. Rep. 1147, 86th Cong., 1st Sess., pp. 39-40; see also remarks of Senator Kennedy, II 1959 Leg. Hist. 1433.

[6] See, e.g., *Texas Industries, Inc.*, 112 NLRB 923, enf'd, 234 F.2d 296 (5th Cir., 1956); *Bangor Bldg. Trades Council*, 123 NLRB 484, enf'd 278 F.2d 287 (1st Cir., 1960); *Bricklayers, Masons & Plasterers Union (Selby-Battersby & Co.)*, 125 NLRB 1179 (1959).

[7] The *Sand Door* decision, *supra*, was perceived by Congress as creating a "loophole" in the secondary boycott provisions of the Act and was one of the reasons Congress took steps in the 1959 amendments "to plug [such] loopholes." See, e.g., II 1959 Leg. Hist. 1431 (Remarks of Senator Kennedy).

munity does not extend to anticompetitive action which exceeds legitimate union interests, the majority reasoned that the Union's conduct here was immune since its "only anticompetitive aspect is that the unions have succeeded in eliminating that feature of competition based on lower standards or wages." (Pet. App. B-32). In practice, however, the anticompetitive impact of an agreement limiting subcontracting to firms signatory to a union contract inevitably extends far beyond competition based on wages and working conditions. For it is a reality of the construction industry that a general contractor who agrees to deal only with unionized subcontractors thereby subscribes not only to union approved wage rates and working conditions, but also to an elaborate set of restrictions upon the methods, materials and components that may be used on any project where he is engaged.

To illustrate the foregoing point, we need not look beyond the practices of the international union with which the respondent herein is affiliated. It is a standard feature of Plumbers' Union contracts with plumbing and mechanical contractors throughout the country to include detailed restrictions upon the use of pipe and other materials cut or fabricated off the jobsite.[8] Standing alone, such clauses may or may not impose valid "work preservation" obligations upon the immediate, signatory employer within the meaning of *National Woodwork, supra.* But in practice, these agreements have frequently been interpreted as obligating the signatory subcontractors to either force architects, engineers, general contractors and others involved in construction projects to modify their specifications to conform with union-approved methods, or else refuse to do business with them. The result is

[8] See, e.g., *American Boiler Mfrs. Ass'n* v. *N.L.R.B.*, 404 F.2d 547 (8th Cir., 1968), and 404 F.2d 556 (8th Cir., 1968), *cert. denied*, 398 U.S. 960; *Local 636, United Ass'n* v. *N.L.R.B.*, 430 F.2d 906 (D.C. Cir., 1970); *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 323 (4th Cir., 1973).

that not only are unionized subcontractors severely limited in the ways in which they can do business, but general contractors dealing with them are subject to similar limitations.

In *Local 636, United Ass'n (Mechanical Contractors Ass'n of Detroit, Inc.)* 177 NLRB 189 (1969), a sister local of the Union herein invoked such a clause in its contract with the plumbing subcontractor on a hospital project to block the use of factory-piped fan coil heating and cooling units which had been specified by the architect and engineer on the project. In reversing the Labor Board's finding that the union acted unlawfully, the court of appeals brushed aside the contention that the conduct unduly limited competition in the methods and materials that could be used. The court stated that a builder who wishes to use prefabricated components "may seek another contractor not bound by such a restrictive union contract." *Local 636, United Ass'n* v. *N.L.R.B.*, 430 F.2d 906, 910 (D.C. Cir., 1970). But if, as here, the builder or general contractor were bound by an agreement not to deal with non-union plumbers, the alternative would be foreclosed and the product boycott inescapable.

Work-restriction agreements of the sort described above are themselves of dubious validity from an antitrust standpoint.[9] The Fourth Circuit, in *Sachs* v. *Local 48, United Ass'n, etc.*, 454 F.2d 879 (1972), made the significant observation that the "mark of a labor dispute is the presence of economic adversaries." The court pointed out that both the subcontractor and his employees may stand to gain by the exclusion of prefabricated products from the jobsite. For where work is done on

[9] It is noteworthy that this Court, in *National Woodwork*, was careful to point out that it was expressing no view upon the antitrust limitations upon "work preservation" agreements found lawful under the Labor Act. 386 U.S. 612, at 631 n.19.

the jobsite rather than in the factory, there is normally not only an increase in the available work for jobsite employees, but a commensurate increase in the contract price paid to the subcontractor. See also, *George Koch Sons, Inc.* v. *N.L.R.B.*, 490 F.2d 393 (4th Cir., 1973). Consequently, the subcontractor may often be more than just an unwilling ally in the union's effort to cause the construction users to cease purchasing prefabricated goods.

The additional leverage gained when such restrictive relationships are combined with an obligation binding the general contractor to deal only with unionized subcontractors makes the restraint upon competition complete. Project owners, architects and engineers are left without the option of utilizing prefabricated or factory assembled components, since their general contractor himself is barred from dealing with subcontractors who are free to install such components. The effect is to deny construction users and the general public the benefits of improvements in technology, materials and efficiency, and to foreclose the opportunity for factory pretesting of components to assure compliance with the highest quality and safety standards.

It is clear that Congress did not intend, in enacting the jobsite proviso to Section 8(e), to authorize such restrictions upon the use of prefabricated products and components in construction projects. The legislative history of the proviso specifically shows that it was not meant to "cover boycotts of goods manufactured in an industrial plant for delivery at the jobsite." See II 1959 Leg. Hist. 1433 (remarks of Senator Kennedy), and I 1959 Leg. Hist. 934, 943 (the Joint Committee Conference Report). This rule applies even if similar or substitute work could be done at the jobsite. *International Union of Operating Engineers, Local 12 (Acco Constr. Equip., Inc.)*, 204 NLRB No. 115 (1973); *Ohio Valley*

Carpenters Dist. Council (Cardinal Industries, Inc.), 136 NLRB 977, 988 (1962).

Unfortunately, however, Labor Board procedures have been only partially effective in limiting the use of such agreements to effectuate product boycotts on construction sites. The Board has, to be sure, resolutely prohibited the use of strikes and strike threats to enforce such agreements in situations where the pressured employer lacks the "right of control" over the decision whether to utilize prefabricated products or jobsite techniques and is, therefore, "powerless to end the dispute." See *Local 438, United Ass'n, etc. (George Koch Sons, Inc.)*, 201 NLRB No. 7, 82 LRRM 1113 (1973), *enf'd*, 490 F.2d 323 (4th Cir., 1973), and cases cited therein. However, the Board has had only limited success in persuading the courts of appeals to approve its view,[10] and the issue has not yet been presented to this Court.[11]

Furthermore, two recent Board decisions involving Plumbers Union affiliates in Southern California appear to authorize a new product boycott technique which significantly undermines the protection derived from prior Board rulings. The cases hold that unions are free to enforce work-restriction agreements through fines and other contractually-specified penalties against the signatory subcontractors, even though strikes or threats for the same purpose would be unlawful. *Southern Calif. Pipe Trades Dist. Council No. 16 (Associated General Contractors of Calif., Inc.)*, 207 NLRB No. 58, 84 LRRM 1513 (1973); *Southern Calif. Pipe Trades Dist.*

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[10] Compare the Fourth Circuit's decision in *Koch, supra*, with *Local 742, Carpenters Union (J. L. Simmons Co.)* v. *N.L.R.B.*, 444 F.2d 895 (D.C. Cir., 1971), and *Local 636, United Ass'n* v. *N.L.R.B., supra*.

[11] The Court explicitly stated in *National Woodwork, supra*, that the validity of the right of control doctrine was "[n]ot before us." 386 U.S. at 616-617, n.3.

Council No. 16 (Kimstock Div., Tridair Industries, Inc.), 207 NLRB No. 59, 84 LRRM 1518 (1973). Thus, in the *Associated General Contractors* case, *supra*, the union invoked fines and other contract penalties against a plumbing subcontractor on a hospital construction project to punish him for assertedly "violating" his contract by installing certain prepiped surgical scrub stations which had been fabricated by Steelworkers Union members in an East Coast manufacturing plant. The scrub stations had been purchased by the project owner and were specifically required in the construction contract with the general contractor. Their design incorporated special water flow and temperature control mechanisms which the jobsite plumbers were found to be incapable of producing. Nevertheless, the Labor Board, expressly bypassing "the secondary-primary employer and work preservation issues," [12] held that the union could penalize the subcontractor under the parties' bargaining agreement for failing to boycott the scrub stations.

Similar contract fines and penalties were permitted to be enforced in the *Kimstock* case against subcontractors who "violated" the work-restrictions of their agreements with the union by failing to honor a boycott against prefabricated fibreglass combination bathtub-shower units, even though, again, the decision to utilize the prefabricated product did not rest with the subcontractor.

In effect, the Board allowed the union in the *AGC* and *Kimstock* cases to construe its collective bargaining agreements as imposing a valid obligation on the subcontractor to boycott independent third persons who purchased or specified prefabricated goods. In other words, the Board approved an interpretation of the contract which clearly set out an employer-union combination in re-

[12] The Board also failed to pass on the question of whether the agreements, as applied, fell within the construction industry proviso to Section 8(e).

straint of trade. Moreover, the Board went further and elevated the agreements, as thus construed and enforced, to the status of a defense to an unfair labor practice charge. This not only fails to recognize the illegality of such agreements, but actively encourages building trades unions to negotiate for them.

Review proceedings are pending in both the *AGC* and *Kimstock* cases (9th Cir., Docket Nos. 73-3354 and 73-3439 respectively), and we are hopeful that the Board's decisions will be set aside. Nevertheless, we believe that it is extremely important that this Court, in considering the issues in the present case, be fully aware of current lower court and agency decisions delineating the scope of the building trades unions' power to dictate the ways in which business can be done in the construction industry. Should a decision issue from this Court upholding the right of the unions to coerce Connell-type subcontracting agreements from general contractors while Board rulings such as those in *AGC* and *Kimstock* stand, the survival of competition based upon efficiency of operation and technology in the construction industry would be seriously endangered.

For these reasons, we believe it is vitally important for the Court to set forth, in its opinion in this case, specific guidelines clarifying the antitrust and labor law limitations upon the right of building trades unions to compel policy and operational changes on the construction jobsite. In our view, the clearest formula for measuring that right, and the one most in tune with established antitrust and labor law principles, would be a rule that the union's right is coextensive with the bargaining obligation between it and the employer in question. In other words, a union violates secondary boycott prohibitions and loses its antitrust immunity when it attempts to force a change in labor policies or methods of operation the substance of which is not bargainable

with an employer owing the union a bargaining duty. Support for this view may be found in both Mr. Justice White's and Mr. Justice Goldberg's opinions in *Jewel Tea*.[13] In the labor law context, additional support for such a test is provided by this Court's decision in *National Woodwork*. The Court therein recognized (386 U.S. at 642-643) that the employees' right to a lawful "work-preservation" clause is a corollary to the employer's obligation under Section 8(a)(5) of the Act to bargain over the contracting out of bargaining unit work under the doctrine established in *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203 (1964). This being so, then the scope of the union's rights must be seen as coextensive with the scope of the employer's duty.

Applying this formula, where there is no duty to bargain at all—as in the situation between Connell and the Union herein—the union has no right to exert pressure on the employer to change either his labor policies or his methods of operation. Further, where there is an existent bargaining relationship between the parties, the union can lawfully compel commitments from the employer only insofar as the substance thereof is bargainable. Since decisions about materials and methods of operation which lie beyond the discretion of the subcontractor on the project would not fall within his collective bargaining authority, the union could not lawfully extract binding commitments from him regarding such matters.

A union's right to negotiate and enforce "work-preservation" agreements against a subcontractor would thus be held to extend only to work which is within the subcontractor's power to assign. To the extent such agreements were extended beyond those limits to reach work which never was nor would be within the subcontractor's power to give, the agreements and their enforcement

[13] See discussion in Judge Clark's dissenting opinion below (Pet. App. B-54-56).

would necessarily embody a prohibited secondary objective. Thus, the scope of the collective bargaining agreement would be seen as limited by the scope of the construction agreement. To hold otherwise would result in the conclusion that the subcontractor has the power to negotiate away not only his own rights, but also the rights of third parties—i.e., the right of the builders, architects and engineers to choose the materials and components for their projects.

Only the clear articulation by this Court of such a coherent antitrust-labor law standard for determining the proper extent of unions' jobsite powers can eliminate the confusion reflected in current Board and lower court decisions. The absence of such clear standards leads to constant overreaching by building trades unions to coerce the acceptance of agreements which serve, not to promote the legitimate interests of union members in the bargaining units affected, but merely to aggrandize the unions' power over ever-greater segments of the construction industry. As we have illustrated, the inevitable cost to the public resulting from such abuses comes not only in increased construction labor cost, but in arbitrary and counterproductive restrictions upon the materials, methods and components that can be used in construction. At a time when inflationary pressures, energy shortages and concerns for consumer safety heighten the importance of technological advances which promote productivity and efficiency in construction and enhance the quality and reliability of the end products thereof, union practices which result in such artificial restrictions cannot be tolerated.

CONCLUSION

For the foregoing reasons, the decision of the court below should be reversed.

Respectfully submitted

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